

JUNE 23. 1767.

A N S W E R S

F O R

DAVID ADAM, Shoe-maker in *Multreeshill*;

T O T H E

PETITION of JOHN MITCHELL Mariner, residing in the
Tenements of *Caldhame*.

THE question between the parties being fully stated in the petition, the respondent thinks it unnecessary to trouble your Lordships with a recital of the titles upon which the dispute arises, or the various steps of procedure in the present competition; he shall, therefore, content himself with answering, in as few words as possible, the different arguments in law insisted on by the petitioner.

First of all, it is proper to observe, that *John Watt's* disposition to his son *Robert* the common debtor, was a conveyance of the absolute property of the tenements and others, the rents whereof are the subject of the present competition, and the precept of *fasine* was only a warrant for taking infeftment of the subject itself, by delivery of the proper symbols, *viz. earth and stone*: In these subjects, *Robert Watt* the common debtor, had never obtained himself infeft, his right was, therefore, personal only, and no deed of his, it is obvious, could create a real burden on the subjects conveyed to him by his father *John Watt's* disposition.

Taking the matter in this view, the respondent does not understand, how *Robert Watt* the common debtor, could grant an heritable bond, so as to affect subjects in which he was not infeft. An heritable bond consists of an obligation to pay, and for security of that payment, an obligation to infeft in an annualrent payable out of the lands, with a precept of *fasine*; and this precept can be attended with the proper effect only when the party is in a capacity to grant it; but when he has no real right himself, that part of the security goes for nothing.

Whatever weight this may have in the case, nothing appears to the respondent more inconsistent, than the method taken by the petitioner, for his security in his transactions with the common debtor. The common debtor, it seems, did not think it necessary to obtain himself infeft, in order to secure his creditor, by granting a right of annualrent, and the petitioner was satisfied, it appears, to have assigned him the unexecuted precept of *fasine* contained in the common debtor's father's disposition. But what was the import of this precept, it was a warrant for taking infeftment in the property of the subject itself, by delivery of earth and stone; there is no warrant for constituting a right of annualrent. Supposing the two heritable bonds good, the *fasines* proceeding upon them, bearing the delivery of a *penny money*, as the symbol of infeftment of annualrent, are void, as given without warrant or authority. It is no less clear, that the constitution of the annualrent, cannot be considered as a conveyance of *John Watt* the common debtor's father's disposition, either total or partial.—Total it was not, because a right of annualrent is not equal to a right of property; partial it was not, because the common debtor's method of constituting the right, was altogether inhabile. For this reason also, the argument used for the petitioner, that *majori inest minus*, can never apply in the present case. But the respondent may very aptly apply to the common debtor, the brocard, *fecit quod non potuit, et quod potuit non fecit*.

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The petitioner, without producing any of the title deeds, admits, that the common debtor's subjects hold feu ; and, at the same time, he also admits, that the sasines taken on these subjects, were recorded in the borough register, kept by the town clerk of *Brechin*. This manner of recording subjects holding feu, the respondent apprehends, is an insuperable objection to the validity of the sasines taken by the petitioner on the common debtor's subjects. These sasines not being recorded in the registers appointed by the acts of parliament, made with regard to registration of sasines, can never affect the respondent, who was not presumed, or bound to know that there were any such in being.

The petitioner alledges, that sasines in small subjects, lying in the neighbourhood of royal burghs, and holding of the community, are by the usage of many burghs in *Scotland*, recorded in the protocol kept by the town clerk. The respondent knows of no such practice, on the contrary, sasines taken on lands lying in and near the capital, holding feu of the magistrates of *Edinburgh*, as come in place of the Lords of regality of *Broughton*, are in use to be recorded in the county register, and never in the protocol kept by the town clerk : But supposing that a practice of this sort may have taken place in some burghs, of which however there is no evidence, it must be admitted to be an erroneous practice, and not countenanced by law, otherways there is no security from the records.

With regard to the expence of the adjudication claimed by the petitioner, it is humbly submitted, with what propriety this is made the foundation of complaint against the Lord Ordinary's interlocutor, rejecting that demand, when your Lordships are informed, that in the last representation for the petitioner, it was maintained, that a charge against the superior was unnecessary in this case. To prevent mistakes, the petitioner's words in that representation shall be laid before your Lordships, to show how inconsistently he acts in this matter.

The petitioner on the 12th page of that representation, after stating his arguments at full length, upon the validity of his infeftments of annualrent, which have already been sufficiently obviated, comes to demand the expence of what he is pleased to call the first *effectual adjudication*, and adds upon this point : " If
" it should be said, that the adjudication was not rendered effectual by infeft-
" ment or charge against the superior, it is answered for the representer, that
" where the debtor is not infeft, no charge against the superior is necessary, as
" the debtor had not become the superior's vassal : A charge against the superi-
" or would therefore in the present case have been quite unnecessary, as *Robert*
" *Watt* the common debtor, had never made up titles by infeftment."

It is true, that the petitioner has since the interlocutor produced a horning, executed against *James Inverarity* merchant in *Brechin*, supposed to be the superior of these tenements of land, and executed also against the provost and two of the baillies of *Brechin*, as if they were superiors : But if the doctrine laid down by himself be good, these charges were quite unnecessary and could have no effect ; and, of consequence, he had no title to be indemnified of that expence, which was unnecessarily, and without effect, laid out by him : And, at any rate, as he has complained to your Lordships, without cause, of the Lord Ordinary's interlocutor in this particular, who had no opportunity to judge of this horning, it is humbly submitted, if he ought not to pay the expence incurred by his fault : And as the interlocutor has this just and equitable effect, to bring in the competing parties *pari passu*, upon the estate of the common debtor, it is hoped your Lordships will have little difficulty to refuse this petition, and to find the respondent entitled to the expence of answering it, which he can but very ill afford to do, without an indemnification.

In respect whereof, &c.

JAMES GRANT.